

There is also better logic to the notion that material effect is an implicit element if the court considers adjusting the equities.<sup>71</sup> In fact, under the prior law, some courts read this requirement into the statute<sup>72</sup> while others would not.<sup>73</sup>

That being said, the question becomes one of what constitutes material effect when that issue is properly before the court. In determining whether military service materially affects a servicemember's ability to meet his/her obligations, the court may compare his/her financial condition prior to entry on active duty with his/her condition while in military service.<sup>74</sup> Another factor that courts have considered is when the default or noncompliance by the servicemember began. When a pattern of noncompliance was begun long before the debtor's induction into the service, it can support a conclusion that military service was not the cause of the debtor's inability to meet the obligation.<sup>75</sup> Consequently, the servicemember seeking relief under this section must show hardship or material effect before he/she is entitled to protection under this section of the Act.

### C. View to Purchase

Under the prior law the statute on installment contracts indicated that the protections and benefits were limited to those situations involving "a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property."<sup>76</sup> It should not go unnoted that the SCRA does not contain this language. As the House Committee on Veterans' Affairs explained, this was meant "to expand the section's protections to non-purchase leases, including leases for automobiles, business or professional equipment, farm equipment and other similar property."<sup>77</sup>

## VII. Mortgages

The SCRA has provisions which affect mortgage foreclosures. The benefits, protections, and procedures are similar to others found in Title III. They are particularly similar to those involving installment contracts. The mortgage provision, however, is specifically designed to protect servicemembers against foreclosure of mortgages and other security interests. Although both are applicable to real or personal property trans-

<sup>71</sup> 50 U.S.C. app. § 532(c)(3).

<sup>72</sup> In one case involving the purchase of furniture, the court noted that "the . . . family now receives but a few dollars less than the gross earnings of defendant before his enlistment." *Holtzman's Furniture Store*, 39 So.2d at 455 (La. App., 1949). In deference to the vendor, the court likewise noted that "[n]o one will doubt for a moment that modern furniture does not improve with usage, and should the plaintiff herein be met with a stay order, there is no question that disadvantage would result." *Id.* See also *Reese v. Bacon*, 176 S.W.2d 971 (Tex. App., 1943).

<sup>73</sup> *Hanson v. Crown Toyota Motors, Inc.*, 572 P.2d 380 (Utah, 1977).

<sup>74</sup> See, e.g., *Harvey v. Home Owners' Loan Corp.*, 67 N.Y.S.2d 586 (1946).

<sup>75</sup> See *Creamer v. Ansopiano*, 52 N.Y.S.2d 862 (Sup. Ct. 1945); *Reese*, 176 S.W.2d 971.

<sup>76</sup> 50 U.S.C. app. § 531(1) (2000).

<sup>77</sup> H.R. REP. No. 108-81, at 40 (2003).

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actions, the installment contract provision does not require a security interest in the property. Given their similarity, decisions rendered under one provision may find utility under either. In any event, the mortgage provision is as follows:

50 U.S.C. app. § 533

- (a) Mortgage as security. This section applies only to an obligation on real or personal property owned by a servicemember that—
  - (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
  - (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage.
- (b) Stay of proceedings and adjustment of obligation. In an action filed during, or within 90 days after, a servicemember's period of military service to enforce an obligation described in subsection (a), the court may after a hearing and on its own motion and shall upon application by a servicemember when the servicemember's ability to comply with the obligation is materially affected by military service—
  - (1) stay the proceedings for a period of time as justice and equity require, or
  - (2) adjust the obligation to preserve the interests of all parties.
- (c) Sale or foreclosure. A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 90 days after, the period of the servicemember's military service except—
  - (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or
  - (2) if made pursuant to an agreement as provided in section 107 [50 U.S.C. app. § 517.]
- (d) Penalties.
  - (1) Misdemeanor. A person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property that is prohibited by subsection (c), or who knowingly attempts to do so, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.
  - (2) Preservation of other remedies. The remedies and rights provided under this section are in addition to and do not preclude any remedy for wrongful conversion otherwise available under law to the person claiming relief under this section, including consequential and punitive damages.<sup>78</sup>

Extended to  
4 months  
in § 2203  
of Housing  
& Economic  
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Act of  
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9 months

<sup>78</sup> 50 U.S.C.S. app. § 533 (LEXIS 2006). Section 517, referenced in section 533, concerns waivers of SCRA protections that servicemembers may execute once they are entitled to those protections. See *id.* app. § 517. See also *supra* para. 2-5.

### *A. Mortgage Foreclosure Basics*

This section applies to purchases of real or personal property that a servicemember makes prior to entry on active duty that are secured by a mortgage or trust deed.<sup>79</sup> If a servicemember breaches the obligation, a sale, foreclosure, or repossession action is not valid unless there is a court order or a waiver from the servicemember.<sup>80</sup> This protection is in addition to any state protection or requirement and extends ninety days beyond the servicemember's period of service.<sup>81</sup> Those who violate the provision could suffer a federal misdemeanor conviction<sup>82</sup> as well as a civil judgment for punitive damages and the like.<sup>83</sup> Of central importance, however, is a provision calling for a stay. A court can grant this relief on its own motion, but it must take action at the request of a servicemember following a showing of material effect.<sup>84</sup> Finally, there is a provision which allows a court to make an equitable adjustment.<sup>85</sup>

### *B. Ownership*

The Act requires the servicemember (or his/her dependent)<sup>86</sup> to have "owned"<sup>87</sup> the mortgaged property prior to his/her entry upon active duty, continuing up to the time relief is sought from the court. Several questions relating to the nature of the ownership required to bring an obligation within the Act's coverage have been litigated.

Generally, the courts have interpreted the word "owned" to mean equitable and legal interests in property. This was the usage given under the Act of 1918<sup>88</sup> and the same meaning was applied to the SSCRA.<sup>89</sup> While the weight of authority supports this proposition, difficulties arise when innocent third parties who are purchasers for value without notice are involved. In these instances, the courts avoid exercising their equitable powers in favor of the servicemember by stating that "equitable" title must be recorded.<sup>90</sup>

### *C. Material Effect*

In order for the court to stay or adjust the obligation, there must be a showing that the servicemember's military service materially affects his/her "ability to comply with the obligation."<sup>91</sup>

A mortgagee bringing a foreclosure action will provide the court with proof of the existence and the extent of the mortgage debt upon which suit is instituted and the date of default in payment. If favorable to him/her the mortgagee will often present the mortgagor's pre-service payment record. This is done when the record demonstrates pre-service default or a continuous pattern of tardy payments.<sup>92</sup>

Having determined that the servicemember "owned" the property, the trial court must then form an opinion on the ability of the servicemember to meet his/her financial obligations. That is, the court must determine whether military service has mate-

<sup>79</sup> 50 U.S.C. app. § 533(a).

<sup>80</sup> *Id.* app. § 533(c)(2). *See, e.g.,* Engstrom v. First Nat'l Bank of Eagle Lake, 47 F.3d 1459 (5th Cir. 1995).

<sup>81</sup> 50 U.S.C. app. § 533(c).

<sup>82</sup> *Id.* app. § 533 (d)(1).

<sup>83</sup> *Id.* app. § 533 (d)(2).

rially affected the servicemember's ability to discharge his/her pre-service responsibilities in the manner agreed upon. As one court has stated, "[t]he criterion, then, is a combination of two factors, *i.e.*, (1) whether the defendant's inability to comply results by reason of such military service, and (2) that such military service has materially affected the ability to comply."<sup>93</sup>

To secure relief, the servicemember should provide the court with sufficient financial information on the material effect of military service.<sup>94</sup> Two pieces of financial information are always essential: pre-service income and in-service income. Pre-service income, out of which the agreed mortgage payments were previously paid on time,<sup>95</sup> is considered as a standard. Typically, in-service income must not only be smaller, but it must be insufficient to reasonably maintain the servicemember before a court will grant relief.<sup>96</sup> Proof of in-service income should include showing the amount of (1) military pay and allowances, (2) allotments to dependents, and (3) any other non-military income, even if earned by dependents. In-service income should be treated as a net amount, because proof of any additional expense caused by military service is proper. When material effect is found, the courts exercise their discretion in fashioning appropriate relief.<sup>97</sup>

<sup>84</sup> *Id.* at p. § 533(b)(1).

<sup>85</sup> *Id.* at p. § 533(b)(2).

<sup>86</sup> *Id.* at p. § 538.

<sup>87</sup> *Id.* at p. § 533(a).

<sup>88</sup> *Morris v. Stober*, 123 N.E. 780 (1919); *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 224, 121 N.E. 15 (1918).

<sup>89</sup> *Fourth Nat'l Bank in Wichita v. Hill*, 314 P.2d 312 (1957) (equitable title not established); *Twitchell v. Home Owners' Loan Corp.*, 122 P.2d 210 (1942) (equitable interest established and servicemember/son allowed to intervene in case involving foreclosure against his mother).

<sup>90</sup> *See, e.g.*, *Godwin v. Gerling*, 239 S.W.2d 352 (1951).

<sup>91</sup> 50 U.S.C. app. § 533(b).

<sup>92</sup> *Franklin Soc. for Home-Bldg. & Sav. v. Flavin*, 40 N.Y.S.2d 582 (1943), *aff'd*, 291 N.Y. 530, 50 N.E.2d 653 (1944).

<sup>93</sup> *Hunt v. Jacobson*, 33 N.Y.S.2d 661, 664 (Sup. Ct. 1942). *See generally* Karen H. Switzer, *Mortgage Defaults and the Soldiers' and Sailors' Civil Relief Act: Assigning the Burden of Proof When Applying the Material Effect Test*, 18 REAL EST. L.J. 171, 177-84 (1989).

<sup>94</sup> The Act does not state which party has the burden of proof. The Supreme Court in *Boone v. Lightner*, 319 U.S. 561 (1943), ruled that the burden of going forward would be determined by the trial courts. In some cases, the servicemember was required to prove material effect. *See, e.g.*, *Queens County Sav. Bank v. Thaler*, 44 N.Y.S.2d 4 (Sup. Ct. 1943). In other cases the one bringing the action against a service member had the burden of proving lack of material effect. *See, e.g.*, *Meyer v. Schmidt*, 46 N.Y.S.2d 420 (County Ct. 1944). In any event, the servicemember should be prepared to go forward with sufficient evidence to support his/her position.

<sup>95</sup> *Meyers*, 46 N.Y.S.2d at 423 ("promptness in the payment of a bill may indicate ability to pay, the failure to be prompt in the payment of bills does not necessarily indicate inability to pay").

<sup>96</sup> *See, e.g.*, *Hempstead Bank v. Collier*, 289 N.Y.S.2d 797, 799 (Sup. Ct. 1967) ("net earnings have not been materially affected by his military service and in fact may actually have been improved").

<sup>97</sup> *See, e.g.*, *Brown Serv. Ins. Co. v. King*, 24 So.2d 219 (1945).

### D. Nature of Relief

In a mortgage foreclosure proceeding, the Act generally provides the servicemember with three types of relief, which, under proper circumstances, are as follows:

- (1) A stay of the proceedings, or an extension of the maturity dates of his/her obligations by way of diminished payments;
- (2) Where foreclosure judgment has already been ordered, a reopening or setting aside of the judgment in order that the reviewer may assert a defense;<sup>98</sup> and
- (3) Where a sale has been had under a judgment of foreclosure, invocation of the statutory redemption period, extended by a period equal to his/her military service.<sup>99</sup>

The extent of the mortgagor's financial disability resulting from military service heavily influences a court's decision on the measure of relief to be granted. Courts attempt to make equitable disposition of individual cases on their particular facts, in an effort "to preserve the interests of all parties."<sup>100</sup> This effort frequently results in granting the mortgagor, in appropriate cases, some form of conditional relief.<sup>101</sup>

Conditional relief usually involves a stay of the foreclosure proceedings on condition that the mortgagor makes some partial periodic payment on the outstanding mortgage debt.<sup>102</sup> In its discretion, the court determines to which of the incidents of the debt the payment will be applied. Although 50 U.S.C. app. § 533 prescribes no priority of application, a pattern has emerged from the cases. Usually, payments are applied in the following order: current and accrued taxes; hazard insurance; interest on the debt; and principal. Arrearages and FHA mortgage insurance premiums have been inserted in the priority scale in various fashions. So also have the application of sums from casualty insurance recoveries, amounts held in escrow by the mortgagee, and property surpluses.<sup>103</sup> Sometimes, when a court has granted a stay and ordered partial payments, the court has also required the servicemember to make periodic sworn state-

<sup>98</sup> The case should be examined, in the event of a default judgment, to determine whether there was either a false affidavit or a failure to file an affidavit as is required by 50 U.S.C.S. app. § 521 (LEXIS 2006). Such a defect may affect the validity of the judgment obtained. *Wilkin v. Shell Oil Co.*, 197 F.2d 42 (10th Cir. 1951)

<sup>99</sup> See 50 U.S.C. app. § 526. See also *Illinois Nat'l Bank of Springfield v. Gwinn*, 107 N.E.2d 764 (1952); *Radich v. Bloomberg*, 54 A.2d 249 (1947); *Flagg v. Sun Inv. & Loan Corp.*, 373 P.2d 226 (Okla. 1962).

<sup>100</sup> 50 U.S.C. app. § 533(b)(2).

<sup>101</sup> A court's examination of the servicemember's true financial situation may be the only protection for the lender, even in cases where the soldier obtained a mortgage after commencing active service. See Bruce H. White and William L. Medford, *The Soldiers' and Sailors' Civil Relief Act-Are You Stayed from Obtaining Relief from the Automatic Stay?*, 18 AM. BANKR. INST. J. 23 (1999).

<sup>102</sup> See, e.g., *Fed. Nat'l Mortgage Ass'n v. Deziel*, 136 F. Supp. 859.

<sup>103</sup> See *Brown Serv. Ins. Co. v. King*, 24 So.2d 219; *R.R. Fed. Sav. & Loan Ass'n v. Morrison*, 40 N.Y.S.2d 319 (Sup. Ct. 1943); *Nassau Sav. & Loan Ass'n v. Ormond*, 39 N.Y.S.2d 92.

ment of his/her financial condition either to the court or to the mortgagee.<sup>104</sup> Conditional stay orders occasionally grant a mortgagee the right to apply for an amended stay order if the mortgagor's ability to discharge his/her debt becomes less impaired.<sup>105</sup> Such an amendment is within the court's power as a matter within its equitable powers and its continuing jurisdiction over the case.

#### *E. Timing of Court Order*

Under the prior law, there was some confusion over a requirement for a court order prior to foreclosure and sale of mortgaged property. This stemmed from language indicating that the foreclosure was not to take place "unless upon an order previously granted by the court."<sup>106</sup> A New Jersey Court had held that any such order must have been granted prior to the servicemember's entry on active duty<sup>107</sup> while a New York court held that the order must have been granted prior to foreclosure; that is, not before the servicemember's entry on active duty.<sup>108</sup> This should no longer be an issue given the provision indicating that the "court order [be] granted *before* such sale, foreclosure, or seizure."<sup>109</sup>

### *VIII. Appraisals Following Foreclosures and Repossession*

This section is designed to provide supplemental relief for all parties when an installment contract or other obligation for purchase of personal property has been stayed under other sections of the Act.

<sup>104</sup> *New York Life Ins. Co. v. Litke*, 41 N.Y.S.2d 526, *modified on other grounds*, 45 N.Y.S.2d 576.

<sup>105</sup> See, e.g., *O'Leary v. Horgan*, 39 N.Y.S.2d 555 (1943).

<sup>106</sup> 50 U.S.C. app. § 532(3) (2000).

<sup>107</sup> *Stability Bldg. & Loan Ass'n v. Liebowitz*, 28 A.2d 653 (1942).

<sup>108</sup> *Syracuse Sav. Bank v. Brown*, 42 N.Y.S.2d 156 (Sup. Ct. 1943).

<sup>109</sup> 50 U.S.C.S. app. § 533(c)(1) (LEXIS 2006). Congress' statement on this point likewise renders this a moot point:

Section 303(c) [50 U.S.C. app. § 533(c)] on mortgages and trust deeds removes the words "unless upon an order previously granted by the court" and inserts the words "upon a court order granted before such sale, foreclosure, or seizure." Two courts construing the original language have disagreed as to when the order must have been previously granted. One court held that the order must have been granted prior to the servicemember's entry onto active duty. *Stability Building and Loan Ass'n v. Liebowitz*, 132 N.J. Eq. 477, 28 A. 2d 653 (1942). Another court held that the order must issue prior to foreclosure on the property rather than entry onto active duty. *Syracuse Savings Bank v. Brown*, 181 Misc. 999, 42 N.Y.S. 2d 156 (N.Y. Sup. Ct. 1943). The Committee believes the latter interpretation is the correct view, being more consistent with the provision's language, "In any proceedings commenced in any court during the period of military service. . . ."

## 50 U.S.C. app. § 534

- (a) Appraisal of property. When a stay is granted pursuant to this Act in a proceeding to foreclose a mortgage on or to repossess personal property, or to rescind or terminate a contract for the purchase of personal property, the court may appoint three disinterested parties to appraise the property.
- (b) Equity payment. Based on the appraisal, and if undue hardship to the servicemember's dependents will not result, the court may order that the amount of the servicemember's equity in the property be paid to the servicemember, or the servicemember's dependents, as a condition of foreclosing the mortgage, repossessing the property, or rescinding or terminating the contract.<sup>110</sup>

This section is applicable in cases where a stay has been granted under this Act in "[a]ny proceeding to foreclose a mortgage on or to repossess personal property, or to rescind or terminate a contract for the purchase of personal property."<sup>111</sup> In such a case, the trial court is empowered to appoint three appraisers to determine the value of the personal property involved. Based on the appraised value, the court may order whatever sum, if any, it believes is representative of the servicemember's equity to be paid to the servicemember or the servicemember's dependent. This payment may be made a condition precedent to foreclosing the mortgage, terminating the contract, or permitting the vendor to resume possession of the chattel. This section has been effectively employed in the situation where the value of the pledged chattel is "rapidly diminishing."<sup>112</sup>

When applying 50 U.S.C. app. § 534, the trial court is faced with the task of striking a delicate balance of the equities between the servicemember, in whose favor a ruling previously has been made by way of a stay or proceedings, and the vendor, who has neither been paid nor has the benefit of the possession of the chattel. The dependents of the servicemember should not be subjected to undue hardship as a result of losing use of the chattel. Thus, their interest should be taken into consideration as well.

In fact, the sole restriction against the court's use of this section is embodied in the clause "if undue hardship to the servicemember's dependents will not result." "Undue hardship" is difficult to define. Therefore, the courts have considered it a factual determination that must be made on a case-by-case basis.<sup>113</sup>

<sup>110</sup> 50 U.S.C. app. § 534.

<sup>111</sup> *Id.* § 534(a).

<sup>112</sup> *See S & C Motors v. Carden*, 264 S.W.2d 627, 629 (1954).

<sup>113</sup> *Commercial Sec. Co. v. Kavanaugh*, 13 So.2d 533 (La. App., 1943).